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before the discovery of the plaintiff's peril. If the negligent act of the defendant occurred before the plaintiff's negligence the cases seem to hold that the doctrine of the "last clear chance" cannot be raised; but there is a great conflict of cases as to the true rule when the defendant has been guilty of some omission of duty which prevented the plaintiff's part from being noticed in time to avoid the injury. Many of the cases take the view that here the doctrine of the last clear chance is founded upon actual knowledge of the plaintiff's danger, irrespective of whether or not it was the defendant's duty to have provided means of knowledge¹² and a few jurisdictions hold that under this doctrine the defendant is liable only if chargeable with wanton fault or recklessness.¹³ It is submitted that both these views are not only incorrect from the point of view of law and logic, but are also extremely discreditable to civilized jurisprudence. The violation of a duty owed to the plaintiff to exercise care to discover his exposed situation should certainly not be permitted to defeat his subsequent recovery—a man should not profit by his own wrongful act. The better view and the weight of authority accordingly holds the defendant liable if the injury results from the omission of an act which constituted a breach of duty owed¹⁴ to the plaintiff, whether this breach occurred before or after the discovery of the plaintiff's danger, if it intervened or continued after the negligence of the plaintiff had ceased.¹⁵ In the principal case *ante*, it is true that the breach of duty owed to the plaintiff continued practically up to the time of the injury, but the plaintiff's own negligence also continued until the accident occurred and consequently the Connecticut court rightly decided that the defendant's negligence was not the sole proximate cause and accordingly affirmed the non-suit of the lower court.

P. C. M. Jr.

TRUSTS—BANK DEPOSIT BY TRUSTEE—*Smith v. Fuller*,¹ in the Ohio Supreme Court, is a recent case denying the right of a trustee winding up the affairs of a defunct savings fund to deposit the

¹¹ *Vote note 9, supra.*

¹² *N. Y., N. H. & H. Ry. Co. v. Kelley*, 93 Fed. 745 (1899); *Sweeney v. N. Y. Steam Co.* 117 N. Y. 642 (1890); *Milwaukee etc. Co. v. Torch*, 108 Wis. 593 (1901); *Barnett v. Chicago & N. W. Ry. Co.*, 132 N. W. Rep. 973 (Ia., 1911); and the decisions in Arkansas, Colorado and Montana.

¹³ *Frazer v. Ala. R. Co.*, 80 Ala. 105 (1886); *Mulhein v. D. L. & W. R. Co.*, 81 Pa. 366 (1877); and cases in Indiana, Louisiana and Oregon.

¹⁴ Some of the courts have gone astray on this point, and have failed to distinguish between a breach of a duty owed and conduct amounting to wanton fault or recklessness.

¹⁵ *Smith v. N. & S. R. Co.*, 114 N. C. 728 (1894); *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351 (1861); *Battlesbull v. Humphreys*, 64 Mich. 514 (1889); *Edgerly v. Street R. Co.*, 67 N. H. 312 (1894); *Virginia Md. R. Co. v. White*, 84 Va. 498 (1889); and the decisions in Kansas, Kentucky, Maryland, Mississippi, Nevada, Utah and W. Virginia.

¹ 99 N. E. Rep. 214 (Ohio, 1912).

trust fund, as a general deposit, in another bank. The trustee left the money with the bank, upon a certificate of deposit, in his name as trustee. The account was not subject to check. No agreement was made to pay interest. There was no stipulation for the return of the identical money. The bank failed, and the trustee was allowed to maintain an action for the whole sum, as a preferred creditor, on the theory that the deposit was special. The court remarked that the trustee was without power to make a general deposit, because that established the relation of debtor and creditor, and therefore amounted to a loan. Since the bank knew of the trust, from the form of the certificate, the parties must have intended to act within the limits of the trust and make a special deposit.

The holding of the court, that a trustee may not make a general deposit in a solvent bank, is clearly against the weight of authority.² True, a trustee must at all times keep the trust *res* under his control,³ and may not make a loan of the funds on merely personal security, but, where the subject of the trust is money, a right to deposit that money temporarily in a responsible bank is recognized almost everywhere.⁴ Such a deposit is not regarded as a loan in violation of the trust, though the relation of debtor and creditor exists between the bank and the trustee. The distinction drawn in *Law's Estate*⁵ expresses very well the underlying thought of the cases. A deposit is a temporary disposition of the money for safe keeping. When not made for safe keeping, but for a fixed period, it is a loan. It is upon this ground of safety that a trustee is justified in making a general deposit of the trust money in a solvent bank, and upon this ground a deposit is distinguished from a loan or investment.

A trustee who keeps a large sum of trust money about his person can hardly be said to be managing his trust according to the general usage of prudent persons. He may be charged with the interest that would have been earned had the money been deposited,⁶ and accordingly, it would seem that he would be chargeable with any consideration paid for a special deposit. If no consideration is paid, the depository, as a gratuitous bailee, is liable only for gross negligence⁷—*quaere*, whether this would therefore be a prudent and proper disposition of the trust fund.

It is, of course, a question of sound common sense, to de-

² *Trustee v. Cockrell*, 106 Ky. 578 (1899); *Law's Est.*, 144 Pa. 499 (1891); *Officer v. Officer*, 120 Ia. 389 (1903); *McAfee v. Bland*, 11 S. W. Rep. 439 (Ky., 1899).

³ *Law's Est.*, *supra*; *Frankenfield's App.*, 102 Pa. 589 (1883); *Lewin on Trusts*, 12th ed., p. 330; *Salway v. Salway*, 2 Russ. & M. 215 (1831).

⁴ *Lewin on Trusts*, 12th ed., p. 330 and citations.

⁵ *Supra*.

⁶ *Dalrymple v. Gamble*, 68 Md. 156 (1887).

⁷ *Foster v. Essex B'k.*, 17 Mass. 479 (1821); *B'k. v. Graham*, 85 Pa. 91 (1877) *Whitney v. B'k.*, 55 Vt. 154 (1882).

termine just when a so-called deposit is really a loan—just how long a temporary disposition for safety might be.⁸

Upon the question whether or not this was in fact a special deposit, it may be said that ordinarily, when money, whether a trust fund or not, is deposited in a bank, it is deemed a general deposit, unless there is an express agreement that it shall be a special deposit or there are circumstances clearly implying such an agreement, for instance, that the money is in packages not to be opened.⁹ This is entirely consistent with the nature of a banking business. Is this presumption overbalanced by the fact that no agreement had been reached relative to paying interest?

There are any number of cases holding that the addition of the word "clerk," or "judge of probate, license money," or "trustee" to the title of an account does not create a special deposit, in the absence of an obligation to return the specific money,¹⁰ nor does the taking of an interest-bearing certificate of deposit,¹¹ or making a deposit as the money of a third person.¹² The trust relation is not carried over when there is no misappropriation.¹³ The chose in action becomes the *res* of the trust, and attempts to secure priority upon the ground that the money itself is impressed with a trust, have failed.¹⁴ Cases holding that the depositary cannot refuse to pay to the *cestui qui trust* are often cited as controlling in such attempts. While the language used may sometimes seem to imply that a trust is imposed on the money, nevertheless, those cases only decide that the *debt* created by the trustee, belongs to the *cestui qui trust*,¹⁵ and cannot be pressed to the extent of holding that the *cestui qui trust* should be a preferred creditor.

Deposits in violation of a statute stand upon an entirely different footing, and the depositary is held to be a trustee.¹⁶ To hold otherwise in such a case would be to ratify a wilful violation of the law.

J. C. D.

⁸ Law's Est., *supra*.

⁹ Morse on Banks and Banking, § 186; Brahm v. Adkins, 77 Ill. 263 (1875); Dawson v. Bank, 5 Ark. 297 (1841).

¹⁰ McLain v. Wallace, 103 Ind. 562 (1885); Otis v. Gross, 96 Ill. 612 (1880); Alston v. Alabama, 92 Alabama 124 (1891); Officer v. Officer, *supra*; Paul v. Draper, 158 Mo. 197 (1900); Law's Est., *supra*.

¹¹ Ruffin v. Commissioners, 69 N. C. 498 (1873).

¹² Henry v. Martin, 88 Wis. 367 (1894).

¹³ Rhineland v. New Madrid Co., 99 Mo. App. 381 (1903); Fletcher v. Sharpe, 108 Ind. 276 (1886); O'Connor v. Mech. Bank, 124 N. Y. App. 324 (1891).

¹⁴ Officer v. Officer, *supra*.

¹⁵ O'Connor v. Mech. Bank, *supra*; Jaffray v. Towar, 63 N. J. Eq. 530 (1902); National Bank v. Ins. Co., 104 U. S. 54 (1881).

¹⁶ McAfee v. Bland, *supra*; District v. King, 80 Ia. 497 (1890); 52 Nebr. 1 (1897). *Contra*: Lowry v. Polk Co., 51 Ia. 50 (1879).